

United States Attorney
Southern District of New York86 Chambers Street
New York, New York 10007

June 19, 2012

Application Granted / Denied
So Ordered.**BY FACSIMILE: (914) 390-4278**Honorable Cathy Seibel
United States District Court
Southern District of New York
300 Quarropas Street, Room 275
White Plains, New York 10601-4150*Cathy Seibel*
Cathy Seibel, U.S.D.J.Da 1: 6/20/12Re: Kelly, et al. v. U.S. Dep't of Veterans Affairs, et al.
12 Civ. 587 (CS)*6/13/12 order is
vacated. The case is
dismissed without
prejudice & shall remain
closed.*

Dear Judge Seibel:

I am the Assistant United States Attorney assigned to represent the interests of the United States Department of Veterans Affairs ("VA") and the following VA officers and employees in their official capacities (collectively "VA Defendants") in the above-referenced action: Eric K. Shinseki, Secretary of the VA; Aileen Hilliard; Nelander Alcindor; Cindy Eastwood; Marilyn Firestone; Kathleen Merando-Barker; Patricia Burke; James Joos; Catherine Napoli; Lude Belony; Marcia Ralph; Mary Stevenson; Tonya Bello Opusunju; and Joanne Callanan.¹ On behalf of the parties, I write to respectfully advise the Court that its June 13, 2012 Order ("Order") [Dkt. No. 8] appears to conflict with a Stipulation of Voluntary Dismissal ("Stipulation") filed by the parties on June 12, 2012 [Dkt. No. 7]. A copy of the Stipulation is attached for Your Honor's reference.

On June 12, 2012, the parties filed the fully-executed Stipulation pursuant to Fed. R. Civ. P. 41(a)(1)(A), which allows an action to be dismissed without a court order through the filing of "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A). Paragraph 1 of the Stipulation provided that the action was to be dismissed "without prejudice." See Dkt. No. 7 at ¶ 1; see also Fed. R. Civ. P. 14(a)(1)(B) ("Unless the notice or stipulation states otherwise, the dismissal is without prejudice."). At the time the Stipulation was filed, the VA Defendants had not agreed to settle this action in exchange for a release of plaintiffs' claims. Rather, the Stipulation was filed, in part, because plaintiffs acknowledged that their claims needed to be administratively exhausted first, before they could file suit in federal court.

On June 13, 2012, however, this Court filed the Order, which stated that the parties had "reported to this Court that this case has been settled," and directed that "this action [be]

¹ Although the complaint also names defendants Maureen Schriber and Angela Wallace, this Office does not represent their interests because the VA has no record that either person was ever employed with the agency.

Honorable Cathy Seibel
June 19, 2012

Page 2

discontinued *with* prejudice" See Dkt. No. 8 at 1 (emphasis added). The Order further provides that the case may be reopened by application by either party "if settlement is not consummated within thirty days of the date of this order." *Id.*

Accordingly, the Court's Order appears to conflict with the Stipulation, given that the parties have neither negotiated nor reached any agreement in principle to settle this case, the "[f]iling of a notice of voluntary dismissal with the court automatically terminates the action as to the defendants who are the subjects of the notice," *Concha v. London*, 62 F.3d 1493, 1509 (9th Cir. 1995), and the terms of the Stipulation and Fed. R. Civ. P. 41(a)(1)(B) support dismissing this action without prejudice. The parties therefore respectfully request that the Order be amended to reflect the parties' intent to voluntarily withdraw this action without prejudice, and to permit this case to terminate as of the date of the Stipulation, without requiring the submission of a settlement agreement or conferring any rights to re-open.

We respectfully request that this letter be docketed, and thank the Court for its consideration of this request.

Respectfully,

PREET BHARARA
United States Attorney

By:


TOMOKO ONOZAWA
Assistant United States Attorney
Tel: (212) 637-2721
Fax: (212) 637-2686
Email: tomoko.onozawa@usdoj.gov

cc: Damond Carter, Esq. (via electronic mail, w/o enclosure)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- X

MATTIE KELLY, ELMORE CUSHNIE, and VELMA
PATTERSON-BROOKS, as well as all other similarly
situated persons,

ECF CASE

Plaintiffs,

-Against-

INDEX NO: 12-CV-
0587(CS)

United States Department of Veterans Affairs, Eric K.
Shinseki, Secretary of U.S. Department of Veterans
Affairs, Aillee N. Hillard, Nelander Alcindor, Cindy
Eastwood, Maureen Schriber, Marilyn Firestone,
Kathleen Merando-Barker, Patricia Burke, James Joos,
Catherine Napoli, Lude Belamy, Marcia Ralph, Mary
Stevenson, Angela Wallace, Tonya Bello Opusunju, and
Joanne Callanan,

STIPULATION OF
VOLUNTARY
DISMISSAL

Defendants.

----- X

WHEREAS, on January 24, 2012, Plaintiffs Mattie Kelly, Elmore Cushnie, and
Velma Patterson-Brooks ("Plaintiffs") filed a complaint (the "Complaint") asserting claims
under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(a)(1) and (2),
and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), against defendant United
States Department of Veterans Affairs, and defendants Eric K. Shinseki, Aillee N. Hilliard,
Nelander Alcindor, Cindy Eastwood, Marilyn Firestone, Kathleen Merando-Barker, Patricia
Burke, James Joos, Catherine Napoli, Lude Belamy, Marcia Ralph, Mary Stevenson, Tonya Bello
Opusunju, and Joanne Callanan in their official capacities (collectively, the "VA Defendants");
and

WHEREAS, the Complaint also named as defendants Maureen Schriber and
Angela Wallace, who have not appeared in this action;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by
and between the attorneys for Plaintiffs and the VA Defendants, as follows:

1. Pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, this
action is dismissed without prejudice.

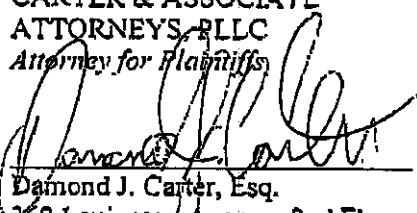
2. The parties understand and agree that this Stipulation and Order contains
the entire agreement between them, and that no statements, representations, promises,
agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not
included herein shall be of any force or effect.

3. This Stipulation may be executed in counterparts. Facsimile signatures
shall constitute originals.

Dated: New York, New York
June 12, 2012

CARTER & ASSOCIATE
ATTORNEYS, PLLC
Attorney for Plaintiffs

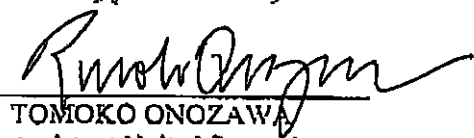
By:


Diamond J. Carter, Esq.
369 Lexington Avenue, 2nd Floor
New York, New York 10017
Telephone: (646) 308-1279
Facsimile: (888) 711-4420
Email: damcart@carter-attorneys.com

Dated: New York, New York
June 12, 2012

PREET BHARARA
United States Attorney
Attorney for the VA Defendants

By:


TOMOKO ONOZAWA
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2721
Facsimile: (212) 637-2686
Email: tomoko.onozawa@usdoj.gov

**FACSIMILE COVER SHEET**

U.S. ATTORNEY'S OFFICE- SDNY
86 CHAMBERS STREET
NEW YORK, NY 10007

From: Tomoko Onozawa
Assistant United States Attorney

Office Phone No.: (212) 637-2721

Fax Number: (212) 637-2686

No. pages (including cover sheet): 5

Date sent: June 19, 2012

**"FOR OFFICIAL USE ONLY" U.S. ATTORNEY FACSIMILE
COMMUNICATION**

The information contained in this facsimile message, and any and all accompanying documents, constitute "FOR OFFICIAL USE ONLY" information. This information is the property of the U.S. Attorney's Office. If you are not the intended recipient of this information, any disclosure, copying, distribution, or the taking of any action in reliance on this information is strictly prohibited. If you received this information in error, please notify us immediately by telephone at the above number and destroy the information. (rev. 9/08)

To: Chambers of the Honorable Cathy Seibel
Fax No. (914) 390-4278

Cc: Damond Carter, Esq.
Counsel for Plaintiff
Via email: damcart@carter-attorneys.com; damcart@hotmail.com

Re: Kelly v. U.S. Dep't of Veterans Affairs, 12 Civ. 587 (CS)

Note: Please see the attached letter from counsel for the VA Defendants.